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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HUMBERTO ROSALES-LOPEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE PETITIONER

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QUESTION PRESENTED FOR REVIEW[2]

Whether the district court's refusal to ask the defense-requested *voir dire* question on possible racial prejudice against a Mexican defendant charged with an immigration offense was a denial of constitutional due process and reversible error for a federal trial court?

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[1]The Petitioner was the only one of the five defendants originally indicted to appeal to the Ninth Circuit and seek review in this Court. Joe Manuel Flores is a fugitive and Jose Humberto Zavala ("the heaviest out of them" [R.T. 220]) pled to a misdemeanor. David Falcon-Zavala and Virginia Hendricks Bowling testified for the Government and received probationary sentences.

[2]Although two questions were presented in the petition for writ of certiorari, this Court granted review only as to the first question.

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OPINIONS AND JUDGMENTS

On 2 April 1979 the Petitioner was sentenced to a term of imprisonment for 18 months (conspiracy), and on the remaining six counts (illegal alien transportation and concealment) was given a consecutive 30-year sentence (six consecutive terms of five years each) suspended and the Petitioner placed on probation for a period of five years [C.R. 16; App. 35-36].[3] The opinion of the U.S. Court of Appeals is now officially reported as *United States v. Rosales-Lopez,* 617 F.2d 1349 (9th Cir. 1980).

JURISDICTION

Jurisdiction of this Court to review by petition for writ of certiorari the judgment of the court of appeals affirming the conviction of the Petitioner for conspiracy and illegal transportation of aliens (18 U.S.C. §371 and 8 U.S.C. §1324) is conferred by 18 U.S.C. §1254(1).[4] On 20 March 1980 the court of appeals entered judgment affirming the conviction of Petitioner, and on 12 May 1980 denied his petition for rehearing. On 20 May 1980 (within the then existing 30-day time limitation pursuant to old Rule 22) the petition for writ of certiorari was filed in this Court.

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[3] "C.R." refers to the document in the Clerk's Record (official papers), and "R.T." refers to the page in the Reporter's Transcript. "App." refers to the joint appendix in this Court.

[4] The Petitioner has been paroled on the 18-month sentence and deported to Mexico (10 October 1979), but the 30-year suspended sentence gives this Court continuing jurisdiction. *United States v. Campos-Serrano,* 404 U.S. 293, 294-95 (1971).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

Article III, Section 2, Paragraph 3: The trial of all Crimes, except in Cases of Impeachment, shall be by jury . . . .

Amendment V: No person shall be . . . deprived of life, liberty, or property without due process of law . . . .

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

STATEMENT OF THE CASE

The Nature of the Case

The Petitioner Humberto Rosales-Lopez[5] was charged and convicted of conspiracy to harbor and transport illegal aliens (18 U.S.C. §371), aiding and abetting Virginia Hendricks Bowling (hereafter referred to as Bowling) in the transportation of three illegal aliens [8 U.S.C. §1324(a)(2) and 18 U.S.C. §2], and with Bowling, as an uncharged co-defendant, of concealing and harboring the same three illegal aliens [8 U.S.C. §1324(a)(3)][6] [C.R. 6].

---

[5]The Petitioner was deported under the name of Martin Gomez-Gonzales according to information provided by the Immigration and Naturalization Service.

[6]For each violation with respect to each alien, 8 U.S.C. §1324(a) (§274 of the Immigration and Nationality Act of 1952) provides a penalty of five years, or a $2,000 fine, or both.

Voir Dire Proceedings

The day before trial, defense counsel filed a Requested *Voir Dire* [Docket Entries 26 February 1979; C.R. 11; App. 9-12]. In this formal request the defense expressly sought personal *voir dire* to probe for bias and to acquire a factual basis for the exercise of challenges:

> Pursuant to Rule 24(a), Federal Rules of Criminal Procedure, to provide effective assistance of counsel and to exercise the defendant's right to a trial by an impartial jury, defense counsel expressly requests the opportunity to personally *voir dire* the prospective members of the jury. Defense counsel expressly agrees to limit his questioning to no more than 30 minutes to make a reasonable inquiry of the background of the prospective members of the jury in order to intelligently exercise his challenges for cause and peremptory challenges. The judge can never adequately probe from the perspective of the defendant. The defense does not object to the Court's general inquiry, but does ask for this opportunity to determine if the jurors are truly sensitive yet unbiased to the issues and persons in this case.

[C.R. 11-1; App. 9]

If the opportunity for counsel to personally *voir dire* the jurors were denied, defense counsel requested the court to ask the prospective members of the jury 26 questions. One of them was a question framed with reference to possible racial prejudice towards the Petitioner:

> 7. Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect you?

[C.R. 11-2; App. 10]

On the morning of the first day of trial, the court indicated

that it would *voir dire* the jury and implicitly denied counsel's request for personal *voir dire* [R.T. 140; App. 13-14]. Defense counsel asked the district judge to give a preliminary instruction to discuss with the prospective jurors their attitude, their understanding of the law, or anything of that nature. This request was made because defense counsel was foreclosed from *voir dire* [R.T. 140; App. 13-14]. The court denied the request for preliminary instructions and indicated that counsel could have a side bar after *voir dire* by the court to ask further questions [R.T. 141; App. 14]. The court advised the jurors that in order for the Petitioner to have a fair and impartial jury trial certain questions would be addressed to the panel and advised that the case involved conspiracy and the substantive offenses to harbor and transport aliens illegally in the United States [R.T. 142; App. 14-15].

The court introduced the Petitioner, counsel, and named prospective witnesses [R.T. 142-43; App. 15-16]. The jurors indicated that they had no prior knowledge of the case from the media and also were unaware of any of the co-defendants [R.T. 143-44; App. 15-16]. After asking the jurors whether they had close friends or relatives employed by law enforcement, the court inquired of those who indicated such contacts whether their judgment would be affected [R.T. 144-45; App. 16-17]. The court then had an exchange with the jurors concerning the fact that this case involved aliens:

> THE COURT: Now, this case, as I have already announced, involves aliens alleged to be illegally in the United States. Do any of you have any feelings about the alien problem at all? Is there anything about it that would cause you to—yes ma'am?
>
> JUROR ROSA: My name is Palos De La Rosa. It is

just a name that they use for the people to transport illegal aliens and to place them intentionally—

THE COURT: Very well. You may be excused. Would you return to the jury lounge, please.

* * *

THE COURT: It might be.

Let me ask the general question: Do any of you have any particular feelings one way or the other about aliens or could you sit as a fair and impartial juror if you are called upon to do so?

In the back row?

JUROR SKELLY: Kristine Skelly, and I have mixed feelings about it. I don't think I could be impartial. I have a tendency to feel—my own feelings, I don't think I could be a fair juror.

THE COURT: Very well, you will be excused. Would you return to the jury lounge, please?

[R.T. 146-47; App. 17-18]

One juror thought the Petitioner looked familiar [R.T. 146; App. 17-18]. The court then inquired as to visual and hearing acuity of the jurors [R.T. 147; App. 18]. In response to a question about legal education, one juror indicated that he was a corporate attorney and the other had been a court liaison with the military [R.T. 147-48; App. 18-19]. The court then asked if any of the jurors had any quarrel with the defendant's presumption of innocence, and after receiving a negative response terminated the general questioning [R.T. 149; App. 19]. The total *voir dire* questioning lasted approximately six minutes[7] [R.T. 141-49; App. 14-24; 26-28].

The clerk then called 31 prospective jurors [R.T. 149-50;

[7]This estimate is based on oral timed readings of the transcript.

App. 20]. When the judge announced that the trial might take two or three days, a juror with a business trip was excused [R.T. 151; App. 21]. The court then put one additional general question to the whole *venire*:

> Does any reason occur to anyone of you why you could not sit in this case as a fair and impartial juror, any reason whatsoever? I assume that the answer is no.

[R.T. 151] The judge then asked each juror to stand up, give his or her name, address, occupation, spouse's occupation, if retired previous occupation, and length of residence in San Diego, and the 31 prospective jurors responded [R.T. 151-56; App. 21-24]. The court then asked counsel to approach the bench. Defense counsel, "to at least preserve [the] concept of the impartial jury and explore the background of challenges and peremptory challenges", asked that the proposed written *voir dire* questions on possible racial prejudice toward the Petitioner be asked:

> The next question as to Mexican descent or race of my client, I think it is Aldredge, 1898, [sic] and notwithstanding the Supreme Court decision as to state cases,[8] clearly in a federal case, the Court must explore all racial antagonism against my client because he happens to be of Mexican descent.

[R.T. 157; App. 25]

Defense counsel also expressly asked that five other previously requested questions be put to the *venire,*[9] [R.T. 158; App. 25-26], but the court refused to use any of these

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[8]Referring to *Ristaino v. Ross,* 424 U.S. 589 (1976).

[9]These questions sought whether the jurors hired illegal aliens (No. 6), worked for the federal government (No. 13), had been a victim of a crime (No. 16), had sat previously as a juror (No. 18), and were able to speak Spanish (No. 23) [C.R. 11-2,3; App. 10-11].

supplemental questions [R.T. 159; App. 25-26].

The court sat three alternates who gave their occupation and residence [R.T. 159-60; App. 26-27]. Using the "struck method" defense and Government counsel exercised all their peremptory challenges on the primary panel.[10] None of the 12 jurors selected had a Hispanic surname[11] [R.T. 160-61; App. 27].

Evidence at Trial[12]

Bowling, an American (Anglo) born in the United States [R.T. 368, 383; App. 31], was originally charged as a felony defendant [C.R. 1]. After pleading guilty to a misdemeanor, the Government had no opposition to the transfer of her case from a district judge to a magistrate and probation. Bowling then testified for the Government [R.T. 414-15]. She had been in the illegal alien smuggling business since December 1977 [R.T. 385-86, 389-90]. One month later her 19-year-old daughter, Kim, met the Petitioner [R.T. 381-82; App. 31]. Kim and the Petitioner fell in love [R.T. 377, 407; App. 32], and in July 1978, Petitioner moved into Bowling's home where her daughter Kim resided [R.T. 360, 382, 407; App. 32]. Kim may have assisted the Petitioner in alien smuggling [R.T. 366, 370; App. 33-34], and Bowling characterized Kim, her daughter and Petitioner's girlfriend, as a "junkie"

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[10]Counsel for Petitioner has lodged with the Clerk the certified list of the jury selection. "D1" means defense peremptory 1, and "G1" means Government peremptory 1.

[11]Lemmon, Howell, Frye, Glenn, Frazee, Stark, Akamatsu, Harder, Kennedy, Workman, May, and Kleeb.

[12]The general background of the case is summarized by the court of appeals at 614 F.2d 1352-53 [App. 37-40].

or heroin user [R.T. 410; App. 34]. During Petitioner's stay with Bowling, he did not contribute to rent, utilities, or food, because he did not have his own money [R.T. 361, 408-09; App. 32-33].

On the morning of 11 December 1978, three Mexicans, all cousins, without documentation entered illegally into the United States with the help of a guide ("coyote") and came to Bowling's residence [R.T. 250-53, 290-91, 316-19]. The guide knocked on the side door of the garage, and the Petitioner let them in [R.T. 253-55, 291-92, 319]. Two of the aliens testified that the Petitioner never spoke to them or gave them orders [R.T. 269, 298], and the third alien testified the Petitioner never said anything to him except outside the apartment in Los Angeles where he was told, "Go upstairs" [R.T. 327]. All other instructions were given by the unknown guide [R.T. 269, 298, 315-24].

In addition to Bowling, former co-defendant Falcon-Zavala testified for the Government that the Petitioner worked for Bowling in alien smuggling [R.T. 431]. The mysterious guide who was said to be in the apartment under continuous surveillance by federal agents was never found [R.T. 218-19, 285-86].

The Petitioner did not testify [R.T. 460, 534], and the defense argued that the testimony of Bowling and Falcon-Zavala was neither credible nor reliable and that Petitioner was not guilty simply because he had associated with alien smugglers [R.T. 529-53].

SUMMARY OF ARGUMENT

The right to trial by an impartial jury includes a reasonable opportunity to probe for bias or prejudice. In a

federal criminal case it is reversible error without a showing of prejudice for a court to refuse defense requested *voir dire* inquiry as to the jurors' attitudes towards the defendant's Mexican descent or race. A question as to "aliens" does not suffice. To insure adequate *voir dire* counsel, with knowledge of the facts of the case, should be permitted to supplement the judge's questioning. The perfunctory six-minute *voir dire* did not adequately probe for racial prejudice.

ARGUMENT

THE INADEQUATE *VOIR DIRE* BY THE TRIAL COURT IN REFUSING TO INQUIRE ABOUT RACIAL PREJUDICE WHEN A MEXICAN WAS CHARGED WITH AN IMMIGRATION OFFENSE WAS A CLEAR BREAK WITH ESTABLISHED PRECEDENT FOR THE FEDERAL COURTS.

> Solon compared laws to spiders' webs which stand firm when any light and yielding object falls upon them, while a larger thing breaks through them and makes off.[13]

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[13]Hicks, I *Diogenes Laertius: Lives of Eminent Philosophers* 59 (Loeb Classical Library 1972 Reprint).

Right to an Impartial Jury

In a federal criminal case the defendant is entitled to trial before an *impartial* jury. (Art. III, Sect. 2; Amend. VI).[14] Elemental fairness as embodied in the Due Process Clause of the Fifth Amendment, would insure that minimum safeguards are used to obtain an impartial jury free of prejudice. In *Peters v. Kiff,* 407 U.S. 493 (1972), this Court stated:

> "A fair trial in a fair tribunal is a basic requirement of due process." . . . The due process right to a competent and impartial tribunal is quite separate from the right to any particular form of proceeding.[15]

407 U.S. 493, 501 (citations omitted).

The origins of trial by jury are unclear, but its Constitutional inclusion was to prevent oppression by the Government.[16] The jury was not always a shield for the accused. It is first mentioned in the Constitutions of Clarendon (1164) as an accusatory body of 12 persons, the precursor of the grand jury, which acted when no individual would dare make a public accusation. The presentment jury evolved into the petit jury in which the jurors were essentially witnesses to the crime. The alternative of trial by ordeal may have appeared more palatable than a trial by one's accusers, so the accused was encouraged to elect a jury trial "on the

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[14]*In re Murchison,* 349 U.S. 133, 136 (1955); *Duncan v. Louisiana,* 391 U.S. 145, 157-58 (1968).

[15]Due process protects against an insane juror, *Jordan v. Massachusetts,* 225 U.S. 167, 176 (1912); an intimidated juror, *Moore ve. Dempsey,* 261 U.S. 86 (1923); or a media-influenced juror, *Irwin v. Dowd,* 366 U.S. 717 (1961).

[16]*Duncan v. Louisiana,* 391 U.S. 145, 151-55 (1968).

country" (*per patriam*) by undergoing pretrial penance (*peine forte et dure*). In 1341 a petty juror was challenged because he had served on the presenting jury, but the challenge was denied by the judge who said, "If the indictor be not there it is not good for the king." In 1352 a challenge to an indictor was allowed.[17] This was but the first step on the road to impartiality, for it was some time before the juror's function as a witness was terminated.[18]

By the time of Blackstone, both challenges for cause and peremptory challenges were well known.[19] Jurors could be challenged for a previous conviction, perjury, serfdom, consanguinity, affinity, enmity, or close friendship.[20] Challenges were given to remove prejudice and acquire an impartial jury.[21] "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds v. United States,* 98 U.S. 145, 155 (1879). Racial prejudice could not be permitted to affect the composition of the jury. This Court in *Strauder v. West Virginia,* 100 U.S. 303, 309 (1880), recognized:

> It is well known that prejudices often exist against particular classes in the community, which sway the

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[17]Forsyth, *History of Trial by Jury* 192-208 (1852); Plucknett, *A Concise History of the Common Law* 127, 433 (5th ed. 1956); Pollock and Maitland, II *The History of English Law* 649 (2nd ed. 1952); Moore, *The Jury: Tool of Kings—Palladium of Liberty* (1973); Spooner, *Trial by Jury* (1852); Wells, "The Origin of the Petty Jury," 107 *Law Quar.Rev.* 347 (1911).

[18]Forsyth, *supra,* 158-167; Proffatt, *Trial by Jury* 43-45 (1877).

[19]4 Blackstone 352-54 (Tucker ed. 1803).

[20]Moore, *supra,* 42.

[21]Forsyth, *supra,* 175; Proffatt, *supra,* 198. Both authors trace the right of challenges in a criminal case to Roman times (*Lex Servilia* B.C. 104).

> judgment of the jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.

Prejudgment, even a limited inclination for or against a defendant, could seriously influence the outcome of a criminal case and must be carefully avoided.[22]

Right to *Voir Dire*

In an American criminal case both parties have the fundamental right to a critical and probing examination of prospective jurors.[23] In *Pointer v. United States,* 151 U.S. 396, 408-09 (1894), the first Justice Harlan stated:

> Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right must be condemned; and therefore

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[22]In *Clark v. United States,* 289 U.S. 1 (1933), a juror who alone held out for acquittal was convicted of contempt for not adequately explaining her contacts with the defendant. *Cf. In re Michael,* 326 U.S. 224, 228 (1945).

[23]Proffatt, *supra,* 219-20; ("The examination of jurors on the *voir dire* is looked upon by the practitioner as a very critical period of the procedure, when the greatest circumspection and discrimination are to be exercised.") Bermant and Shapard, *The Voir Dire Examination, Juror Challenges, and Adversary Advocacy* 7-8 (Federal Judicial Center 1978) ("In conclusion, we accept that, in certain circumstances, practitioners may have to employ the most vigorous *voir dire* and challenge practices simply to select a reasonable jury."); Cornish, *The Jury* 47 (1968) ("The system in the United States accepts that if a right of challenge is to be a real one under modern conditions, the litigants must be furnished with an opportunity to find out the antecedents and attitudes of the potential jurors.") Lord Devlin favors American *voir dire* to discover prejudice, for this practice is seldom used in English courts. Devlin, *Trial by Jury* 27-37 (1956).

> he cannot be compelled to make a peremptory challenge until he has been brought face-to-face, in the presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due administration of justice.

See United States v. Marchant, 12 Wheat. 480 (1827); *Connors v. United States,* 158 U.S. 408, 413 (1895).

In *Dennis v. United States,* 339 U.S. 162, 171-72 (1950), the Court held: "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." On the basis of that language the Court reversed a conviction where the trial court refused to interrogate the prospective jurors who were Government employees on the effect of a Presidential "Loyalty Order." *Morford v. United States,* 339 U.S. 258 (1950).

More recently this Court in preserving the unfettered right to exercise the peremptory challenge also approved the questioning of prospective jurors:

> Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the *voir dire* and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause.

Swain v. Alabama, 380 U.S. 202, 219-20 (1964).[24] The Court required more than mere mummery or the flaccid incantation of a litany of rhetorical questions. Merely going through the form of obtaining jurors' assurances of impartiality is not *voir dire.* Something more than a nod of the head

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[24]In *Swain* Justice White noted: "The *voir dire* in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories, and the process of selecting a jury protracted." 380 U.S. 202, 218-19.

(sometimes no answer being construed as a response) to questions truly seeking no answer is required. Not only the right to challenge, but the right to question must be preserved.[25]

Fifty years ago defense counsel in a federal criminal case sought to inquire of the *venire* as to racial prejudice. The trial court summarily refused, and this Court in *Aldridge v. United States*, 283 U.S. 308 (1931), speaking through Chief Justice Hughes, reversed:

> The argument is advanced on behalf of the government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

283 U.S. 308, 314-15.

In *Swain v. Alabama, supra,* the Court held:

> For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. It is well known that these factors are widely explored during the *voir dire,* by both prosecutor and accused, *Miles v. United States,* 103 U.S. 304; *Aldridge v. United States,* 283

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[25]The English not only place little weight on *voir dire* but also have substantially curtailed peremptories, now limited to three. Baldwin and McConville, *Jury Trials* 91-92 (1979). In contrast, a recent effort to reduce the number of defense peremptory challenges from ten to six in a federal criminal case was rejected by Congress. Pub.L. 95-78; 91 Stat. 320 (30 Jul 77); 1977 *U.S. Code Cong. & Admin. News* 533.

U.S. 308. This Court has held that the fairness of trial by jury requires no less. *Aldridge, supra.*

380 U.S. 202, 220-21.

In *Ham v. South Carolina,* 409 U.S. 524 (1973), the Court held that the Due Process Clause of the Fourteenth Amendment necessitated *voir dire* as to racial prejudice in a case involving a black civil rights worker charged with an offense of possession of marijuana which may have been "planted."[26] Three years later in *Ristaino v. Ross*, 424 U.S. 589 (1976), the Court decided that although the Federal Constitution did not demand this inquiry in every state criminal case, it was mandated in federal criminal cases:

> Although we hold that *voir dire* questioning directed to racial prejudice was not constitutionally required, the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant. Under our supervisory power we have required as much of a federal court faced with the circumstances here. See *Aldridge v. United States, supra;* cf. *United States v. Walker,* 491 F.2d 236 (CA 9) cert. denied, 416 U.S. 990 (1974); *United States v. Booker,* 480 F.2d 1310 (CA 7 1973).

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[26]In *Hamling v. United States,* 418 U.S. 87 (1974), the Court stated, "Those cases [*Aldridge* and *Ham*] held that in certain situations the judge must inquire into possible racial prejudices of the jurors in order to satisfy the demands of due process." 418 U.S. 87, 140.

424 U.S. 589, 597 n.9.[27]

The district court's failure to conduct any inquiry as to racial prejudice after an express request from the defense both before and after *voir dire* constitutes a clear violation of the *Aldridge-Ristaino* doctrine for federal courts.

The protection afforded by this inquiry as to race extends to a Mexican. In *Aldridge* the Court stated:

> The right to examine jurors on the *voir dire* as to the existence of a disqualifying state of mind has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character.

283 U.S. 308, 313. In *Hernandez v. Texas,* 347 U.S. 475 (1954), Texas had attempted to state there were two racial classes—white and Negro—within the contemplation of the Fourteenth Amendment. This Court made it clear that discrimination on the basis of race or color, including delineation as to Mexican descent, was prohibited. *See also*

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[27]*Swain v. Alabama,* 380 U.S. 202, 204-05 (1964). The Ninth Circuit *Walker* decision involved a black defendant charged with forgery of United States Treasury checks in which case two of the Government's chief witnesses as well as three of the jurors were black. The refusal to ask the question as to racial prejudice was approved. In contrast, the Seventh Circuit *Booker* decision written by Justice Stephens (then circuit judge) reversed the conviction of a black defendant convicted by a jury with five blacks for failure to conduct an inquiry as to racial prejudice. Since *Ristaino* there is a split among the circuits as to whether in a federal criminal case upon request by the defense the question must be put to the prospective jurors concerning racial prejudice: *United States v. Rucker,* 557 F.2d 1046 (4th Cir. 1977); *United States v. Bowles,* 574 F.2d 970 (8th Cir. 1978); *United States v. Williams,* 612 F.2d 735 (3rd Cir. 1979); *Contra, United States v. Floyd,* 535 F.2d 1299 (D.C. Cir. 1976); *United States v. Polk,* 550 F.2d 1265 (10th Cir. 1977). *See also* Eclavea, *Voir Dire—Pretrial Publicity,* 28 A.L.R.Fed. 26, 68-69 (1976).

Castaneda v. Partida, 430 U.S. 482, 495 (1977); *White v. Regester,* 412 U.S. 755, 767 (1973). *Cf. United States v. Bear Runner,* 502 F.2d 908 (8th Cir. 1974) (the trial court with an Indian defendant did not adequately probe for latent racial prejudices).

The district court asked the prospective jurors if they had any feelings "about the alien problem" or "aliens" [R.T. 146-47; App. 17]. To the question about the alien problem a juror reacted to the name used for people to transport illegal aliens and the placement of them, but the district court did not even permit her to finish her response. Apparently the juror was concerned about the illegal aliens transported and the possibly unkind characterization of the transporters (*i.e.,* "coyote"). The second juror in responding to her feelings about aliens indicated that she could not be an impartial or fair juror. The remarks of both prospective jurors apparently were to aliens or persons being transported into the United States, but the inquiry never extended to or probed their attitude toward the Petitioner as to his race or Mexican descent (*i.e.,* color ethnicity). His citizenship was irrelevant.

More importantly, this Court in *Espinoza v. Farah Mfg. Co.,* 414 U.S. 86 (1973), held that the protection of Title VII of the Civil Rights Act of 1964 that prohibited discrimination on the basis of race or national origin was clearly distinguishable from discrimination on the basis of alienage.

Although the alienage of the Petitioner, if it had been raised at trial, might have been an appropriate area of inquiry, the defense, understandably, was more concerned with the jurors' attitudes on racial prejudice rather than American citizenship or lawful residence. The focus of the perfunctory inquiry tended to protect the Government's right to a fair trial by locating jurors who may have felt that laws penalizing poor people who come to the United States

seeking only a place to work were unfair and unjust. The sympathies inherent in the responses to the court's question related to the persons transported. The court's interruption and curtailment of the response of the first juror to the question intimated to others that the court did not want an answer. With these responses, the court's failure to conduct further inquiry or to grant defense counsel's repeated requests for this inquiry as to racial prejudice was error.

This case was a criminal enforcement of the Immigration and Nationality Act of 1952 which has been characterized as racist in itself.[28] The principal Government witness against the Petitioner was a white Anglo, and her testimony revealed that he lived in her house with her daughter as her daughter's lover and was supported by the mother. That relationship could have easily aggravated any latent racial antagonism of an Anglo juror towards a Mexican. In the context of this case there was both a constitutional due process violation (*Ham*) as well as a violation of the supervisory guidelines established by this Court for federal courts (*Aldridge*).

Not Harmless Error

The refusal to make any inquiry as to racial bias of the prospective jurors after Petitioner's timely request, an "essential demand of fairness," requires reversal. *Aldridge v. United States,* 283 U.S. 308, 315 (1931); *Ham v. South Carolina,* 409 U.S. 524, 529. Without the questioning there may have been jurors harboring racial prejudice towards the

[28]Teitelbaum, "Right versus Right: Immigration and Refugee Policy in the United States," 59 *Foreign Affairs* 21, 23, 26, 31-32 (Fall 1980).

Mexican defendant that can never be adequately evaluated from the cold record. Because trial courts would be scandalized by tolerating the potential for racial prejudice on a jury, no showing of actual prejudice should be required.[29]

Especially in federal proceedings, even if there is no proof of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or appearance of bias. *Peters v. Kiff,* 407 U.S. 493, 502 (1972).[30]

Contemporary Federal *Voir Dire* Practice

In the exercise of this Court's supervisory authority over the federal judiciary may the six-minute *voir dire* of the prospective jurors by the judge be treated as an adequate inquiry to ensure an impartial jury under Rule 24(a)?[31]

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[29]The majority of circuits would not treat the failure to inquire as to racial prejudice as harmless. *United States v. Carter,* 440 F.2d 1132, 1134 (6th Cir. 1971); *United States v. Booker,* 480 F.2d 1310, 1311 (7th Cir. 1973); *United States v. Robinson,* 485 F.2d 1157, 1159 (3d Cir. 1973); *United States v. Bowles,* 574 F.2d 970, 973 (8th Cir. 1978); *United States v. Williams,* 612 F.2d 735, 737 (3d Cir. 1979); *but see United States v. Johnson,* 527 F.2d 1104, 1106-07 (4th Cir. 1975); *United States v. Floyd,* 535 F.2d 1299, 1302 (D.C. Cir. 1976).

[30]In *Swain v. Alabama,* 380 U.S. 202, 219 (1965), this Court held: "The denial or impairment of the right [to probe on *voir dire*] is reversible error without a showing of prejudice [citations omitted.]."

[31]Rule 24(a), Fed.R.Crim.P., states:

> The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

For background on the drafting and the implementation of this rule, *see* Orfield, *Trial Jurors in Federal Criminal Cases,* 29 F.R.D. 43 (1961).

In *Ham,* this Court stated that either of the brief questions proposed by the petitioner would have been sufficient, and in the context of a state case the Court was reluctant to establish any number or particular form of the questions. In this case if the trial court had asked: "You wouldn't be prejudiced against the defendant because of his race or being Mexican, would you?", would that question have been adequate? Even the question: "Do you have any racial prejudice?" is not a valid inquiry on such a sensitive subject. One question may be sufficient in the total context of the *voir dire,* but hopefully this Court would not place its imprimatur on a useless and ineffective form question.

It takes time to discover latent prejudice, especially racial prejudice,[32] which can only be properly explored with knowledge of the case that the court often lacks. The court should have permitted a more expanded, but not necessarily uncontrolled, *voir dire* by counsel to meet the rudimentary requirements of due process. As a practical matter, there was no *voir dire* in this case, and the atmosphere of "rush to judgment" permeated both *voir dire* and the trial. The six-minute questioning in this case may be an extreme example, but 15-minute *voir dires* are not uncommon in the federal courts. This Court should restructure the judicial approach to *voir dire* in federal courts because of the practically unreviewable discretion given to the district judge.

For the year ending 30 June 1980, there were 3,418 federal criminal jury trials. As of that date there were 516

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[32]For example, *see* the 12 tests for racial prejudice suggested by Brigham, Woodmansee, & Cook, "Dimensions of Verbal Racial Attitudes; Interracial Marriage and Approaches to Equality," 32 *Journal of Social Issues* 9-21 (1976).

authorized judicial district court judgeships, and approximately seven criminal jury trials per authorized judgeship.[33] Given the number of jury trials per judge in the federal court system, this Court, in the exercise of its supervisory power, should provide counsel an opportunity to inquire into the backgrounds of the jurors so as to properly exercise challenges for cause and peremptory challenges.[34] The 1977 survey of federal judges on *voir dire* examination revealed that 75% of all federal judges exclude oral participation by counsel during *voir dire.*[35] As to the duration of the typical criminal *voir dire,* 92% of the surveyed federal judges indicated it took less than two hours, and 65% indicated less than one hour, for an overall average of 50 minutes.[36] Judge-conducted *voir dire,* excluding attorney participation, increased the duration of *voir dire* (average 71 minutes), yet counsel-conducted *voir dire* with the judge not present was the shortest (average 45 minutes).[37]

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[33]For the year ending 30 June 1980 there was a total of 7,353 jury trials, including civil cases, or 15 jury trials per authorized judge. *1980 Annual Report of the Director,* Administrative Office of the U.S. Courts, Table C-8. For this same year there was an 11.5% decline in new criminal filings. *Id.* 4. As of 30 June 1980 thee were 32 district judge vacancies (*id.* 2), but these vacancies do not affect the number of jury trials per judge.

[34]*American Bar Association Standards Relating to the Administration of Criminal Justice: Trial by Jury,* Standard 15-2.4 (Approved Draft 1978); *Uniform Rules of Criminal Procedure,* Rule 512(b) (1974).

[35]Bermant, *Conduct of the Voir Dire Examination: Practices and Opinions of Federal District Judges* 5 (Table 1) (Federal udicial Center 1977).

[36]*Id.* 13 (Table 4).

[37]*Id.* 14 (Table 6).

Traditionally, the principal objection to counsel's participation in *voir dire* in the federal criminal courts has been that counsel takes too long. In the past there have been some unwarranted and protracted *voir dires,* perhaps in some instances for possibly improper motives (didactic), but Bermant noted, "The median estimated duration for criminal case examinations was 52 minutes with oral participation [of counsel] and 51 minutes without [by the judge alone]."[38] A one-minute difference does not appear to justify the total exclusion of counsel, and the court's ability to require *voir dire* questions to be presented in advance could preserve the judge's now existing authority under Rule 24(a) to restrict improper questioning by counsel.

In this case counsel requested 30 minutes supplemental *voir dire.* The court's summary denial of counsel's participation without any reasons or statements, aggravated by the court's own cursory inquiry, fell below any minimum standard that should be expected of a federal court. This Court should permit counsel to request at least 30 minutes *voir dire* (per side) subject to the questions being first reviewed by the trial judge.[39] In the struck jury system, predominantly used in federal courts, there are approximately 30 prospective jurors called, and the allocation of 30 minutes would permit counsel one minute per juror.

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[38]*Id.* 14 n.20.

[39]The Ninth Circuit Judicial Conference on 14 July 1980, although rejecting the concept of counsel-conducted *voir dire* in criminal and civil cases, did adopt a resolution recommending that "in criminal cases counsel for either side be given a minimum reasonable opportunity (*i.e.,* 15 to 30 minutes) to supplement the *voir dire* questioning by the judge." The Ninth Circuit Judicial Council referred this to the Conference of Chief Judges of the Ninth Circuit.

The pendulum has swung too far. *Voir dire* has been reduced to a ritual.[40] This Court must provide some outer limit guidelines for the unfettered discretion now exercised by federal judges over this critical stage of the trial.

The *voir dire* question proposed in this case was partially open-ended. It permitted something more than a simple "yes" or "no" answer. This probing inquiry should not be reduced to a single formula question.[41] The standard question often asked by the judge is, "Can you be fair?" To that question the jurors invariably answer in the affirmative. This is not the adequate examination or searching fundamental to American jury trials. In *United States v. Dellinger,* 472 F.2d 340, 367 (7th Cir. 1972), the court stated:

> The government's position must rest upon an assumption that a general question to the group whether there is any reason they could not be fair and impartial can be relied on to produce a disclosure of any disqualifying state of mind. We do not believe that a prospective juror is so alert to his own prejudices. Thus it is essential to

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[40]"However the very brief examination durations reported by many judges suggest a routinized or ritualized *voir dire* practice . . . . Certainly there is nothing in the theory or practice of behavioral science that leads us to believe subtle bias or prejudice can be accurately assessed so quickly." Bermant, *supra,* 25. *See also* Bermant and Shapard, *supra,* 26-27.

[41]For some excellent materials that provide samples of effective inquiry as to racial prejudice, *see* Bonora and Krauss, *Jurywork: Systematic Techniques* 43-45, 155-56, 178-84 (1979); and Ginger, *1980 Supplement to Jury Selection and Criminal Trials: New Techniques and Concepts* 298-305, 391-402. Both of those texts are for defense lawyers, but the former presiding judge of the Los Angeles County Superior Court has set forth some minimal types of questions that could be used to explore for racial prejudice. Wenke, *The Art of Selecting a Jury* 66-68, 106-16 (1979).

explore the backgrounds and attitudes of the jurors to some extent in order to discover actual bias, or cause.[42]

This Court may not be able to dictate the type or form of the questions but should require that the questioning allow jurors to sufficiently reveal their attitudes, giving counsel the chance to further explore possible areas of prejudice or bias and thus have a basis upon which to exercise his challenges.[43]

Voir dire questioning could be further expedited by providing counsel biographical information on the prospective jurors prior to trial [*see* 28 U.S.C. §1867(f); *Test v. United States,* 420 U.S. 28 (1975)]. The use of a legal attitudes questionnaire by prospective jurors that might then be furnished to counsel before trial has been suggested.[44] If basic information about jurors is presented to counsel at least 24 hours prior to trial, the *voir dire* can be both efficient and effective. Few counsel submit more than 50 *voir dire* questions. A 30-minute time limitation would permit counsel to select and phrase those questions for the *venire* most pertinent to the case. This procedure, unless the judge is absent, would be subject to judicial supervision.

The American jury today is the modern version of a trial

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[42]In *United States v. Bear Runner,* 502 F.2d 908, 912 (8th Cir. 1974), the court stated:

> In the instant case, the court's single question concerning racial bias was not only general in scope but was made to the prospective *veniremen* as a group. The effect was more like a monologue by the court than a probing examination of the jurors.

[43]Adequate *voir dire* can reveal defects not otherwise discernible under the now tolerated perfunctory questioning. *See United States v. Eubanks,* 591 F.2d 513 (9th Cir. 1979).

[44]Note, "Juror Bias—A Practical Screening and the Case for Permitting Its Use," 64 *Minn.L.Rev.* 987 (1980).

"on the country," that is, by the average citizen with his or her inherent strengths and weaknesses, called into service to review the process of criminal sanctions. This is the option to trial by government officials (*i.e.*, judges). What the prospective jurors see in the courtroom will teach them much of how our government functions. More importantly, the nature of the questioning by the judge to a large extent predetermines the role or function of jurors in the proceedings.[45] If it is perfunctory and meaningless, jurors get the "message." If it is a ceremonial artifice preceding the preferred verdict of guilty, their individual responsibility to decide the issues will be relaxed to conform to the verbally or nonverbally telegraphed, anticipated outcome. When the signs sent out are "Let's get this case over as quickly as possible because it really isn't very much," it adversely affects the defendant and corrodes the principle of impartiality.[46]

In bygone days a visitor to this country made some then-perceptive, perhaps idealistic, observations about the jury as a political institution:

> The jury . . . serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes *with a respect for the thing judged, and with the notion of right.* If these two elements be removed, the love of independence is reduced to a mere destructive passion. It teaches men to practice equity; *every man learns to judge his neighbor as he would himself be judged*....[47]

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[45]Asking questions and ruling on challenges, the trial judge serves as a guide for the juror as an impartial factfinder. Bermant, *supra,* 25-26.

[46]Note, "Judges' Nonverbal Behavior in Jury Trial: A Threat to Judicial Impartiality," 6 *Va.L.Rev.* 1226 (1975).

[47]de Tocqueville, I *Democracy in America* 336-37 (Schocken, 1961 ed.) (emphases added).

The *pro forma voir dire* denigrates the importance of the role of the juror called into public service to judge his fellow. The qualifications of the office are not much, because the questioning is so short. The judge does not want answers other than in compliance with an antiquated process of questioning that apparently serves no purpose. Supermarket justice—the speed, not the object—is all important. The person on trial is merely an unfortunate cog in a master apparatus that cares little for his views of the impartiality of his judges. He means little. Because he is Mexican, he could never be like them.

CONCLUSION

Because of the standardless discretion that now exists for federal judges concerning *voir dire,* this Court in the exercise of its supervisory power should require federal courts to permit *voir dire* by counsel for a period not to exceed 30 minutes each side and should require the use of open-ended questions or techniques that will ensure proper probing as to the attitudes of the jurors so as to discover bias or prejudice, especially racial prejudice. Because the opinion of the lower court conflicts with established federal precedent, it is requested that the judgment be reversed.

Respectfully submitted,

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